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03-45

No. _____

IN THE

Supreme Court of the United States

October Term 2002

RONALD SKINNER,
Petitioner,

v.

DAVID DORMIRE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in failing to order the granting of habeas corpus relief on Petitioner Ronald Skinner's issue of prosecution misconduct arising from the prosecutor's withholding of material witness impeachment evidence that the two key state witnesses had received favorable treatment on criminal charges from the prosecutor in exchange for their false testimony against Skinner?

2. Whether the Eighth Circuit erred in failing to order that an evidentiary hearing should be held to consider evidence of prosecution misconduct showing that the only two witnesses who claimed that Petitioner fired the fatal shot have recanted their trial testimony and have sworn under oath that the prosecutor enticed them to testify falsely so they would receive favorable treatment on felony charges pending against them?

3. Whether the district court and the Eighth Circuit applied the wrong standard in denying a certificate of appealability, thus refusing Petitioner an opportunity to appeal the district court's denials of habeas corpus relief and an evidentiary hearing regarding prosecution misconduct when Petitioner had made a substantial showing of the denial of a constitutional right because the evidence shows that the prosecutor failed to disclose that he dismissed felony charges against the two key state witnesses in return for their false testimony against Skinner?

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CITATIONS OF OPINIONS AND ORDERS BY COURTS

On September 10, 2001, the federal district court denied Petitioner Ronald Skinner's Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 and in the same unpublished order stated it would not issue a Certificate of Appealability. *Skinner v. Dormire,* Cause No. 4:97CV761, Memorandum and Order (E.D.Mo. Sept. 10, 2001). Appendix B. The district court subsequently denied Petitioner's Rule 59(e) Motion in an unpublished order.

The Eighth Circuit Court of Appeals' Judgment denying Petitioner Ronald Skinner's Application for a Certificate of Appealability was issued in an unpublished order on November 19, 2002 in *Ronald Skinner v. David Dormire,* No. 02-2062 (8th Cir. 2002). The Eighth Circuit's order is attached as Appendix A. The Eighth Circuit's denial on January 30, 2003 of Skinner's petition for rehearing by the panel and petition for rehearing by the court *en banc* is attached as Appendix D.

JURISDICTIONAL STATEMENT

On November 19, 2002, the United States Court of Appeals for the Eighth Circuit entered a Judgment denying Petitioner Ronald Skinner's Application for a Certificate of Appealability and dismissing the appeal. On January 30, 2003, the Eighth Circuit denied Ronald Skinner's petition for rehearing and petition for rehearing *en banc*.

On April 22, 2003, the United States Supreme Court granted Petitioner's motion for an extension of time in which to file the petition for a writ of certiorari until June 29, 2003.

28 U.S.C. Section 1254(1) and 28 U.S.C. Section 1651 are the statutory provisions that confer jurisdiction allowing the United States Supreme Court to review this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

This case involves the Fifth and Fourteenth Amendments to the United States Constitution, as well as the provisions of the federal habeas statute concerning issuance of certificates of appealability, 28 U.S.C. Section 2253.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2253(c) of 28 U.S.C. provides in pertinent part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ...
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

A. Procedural History

Following a jury trial in May of 1986 in the Circuit Court of St. Louis City, Ronald Skinner was convicted of murder in the first degree. The state trial court sentenced him to a term of imprisonment for life in the Missouri Department of Corrections, without the possibility of probation and parole, in accordance with the jury's verdict. Thereafter, state courts denied Petitioner's direct appeal, post-conviction proceedings, and post-conviction appeal.

Petitioner next sought federal habeas corpus relief pursuant to 28 U.S.C. Section 2254 in the United States District Court for the Eastern District of Missouri. On September 10, 2001, the district court denied habeas relief, denied an evidentiary hearing, and ruled that it would not issue a certificate of appealability.

Skinner filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit on April 17, 2002. The Eighth Circuit Court of Appeals had jurisdiction to consider the appeal pursuant to 28 U.S.C. Section 1291 as an appeal from a final decision of the district court.

On November 19, 2002, the Eighth Circuit Court of Appeals denied Ronald Skinner's Application for a Certificate of Appealability and dismissed the appeal. Subsequently, on January 30, 2003, the Eighth Circuit denied Skinner's petition for rehearing and petition for rehearing *en banc*

Ronald Skinner now petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

B. Statement of Facts

1. State Court Proceedings

Evidence presented at trial indicates that Edward Little and Ronald Skinner arranged to meet at O'Fallon Park in St. Louis, Missouri on September 3, 1985 to enable Little to exchange nine ounces of hashish and three hundred dollars in return for a pound

of marijuana from one of Skinner's friends. Edward Little's girlfriend, Diane Green, and Diane Green's sister, Janine Green, were seated in the front seat with Little.

Janine Green and Ronald Skinner testified that Little and Skinner talked for a few minutes while Skinner was standing outside the car. Skinner testified he only entered the car after he told Little that his two friends who had accompanied him were holding the marijuana elsewhere and that Little would not proceed with the drug transaction unless Skinner rode with him.

Shooting broke out in the car, causing non-mortal gunshot wounds to Little's arm and to Janine Green's ear. Diane Green was shot twice, with a fatal wound to her head.

There was differing testimony as to how the shooting occurred. Little testified that all shots came from Ronald Skinner in the backseat.

Skinner testified that Edward Little, Diane Green and Janine Green had been smoking PCP laced cigarettes when he met them. Trial Transcript, at 894. He further testified that Diane Green and Little fought about whether she was going to give Little the money for the drug transaction and that Little pulled out a gun. *Id.*, at 897-900. When Skinner saw the gun, he did not know whom Little was planning to shoot. *Id.*, at 899. Skinner testified he reached for the gun to take it away from Little, but Little struggled with him and during the struggle, the gun fired several shots. *Id.*, at 900.

Janine Green testified that she did not see who shot Diane Green. *Id.*, at 470, 505-506. Janine Green's head was turned as she looked out of the passenger window at a second car that had followed them to the drug transaction site. *Id.*, at 470, 495, 508. She did not see who was holding the gun and she did not know who fired the shots. *Id.*, at 473, 489. Specifically, she never testified that Ronald Skinner was the person who fired the shots.

No other witness to the shooting testified at trial. The only witness to present evidence that Petitioner intentionally shot Diane Green was a jailhouse informant named Sereno Thompson. Thompson testified that Skinner told him that the gun was his and he planned the shooting. *Id.*, at 797. Thompson denied receiving any promises for leniency on pending charges against him. *Id.*, at 806. Thompson testified that he still had to serve about two years

in prison. *Id.*, at 805. Thompson failed to mention that he would soon be released from serving the remaining time on his prison sentence and that a recent charge of escape from confinement would be dismissed in exchange for his testimony.

A jury convicted Petitioner Ronald Skinner of murder in the first degree. The jury rejected the prosecutor's argument to sentence Petitioner to death and instead the jury recommended that Petitioner receive a term of life imprisonment without the possibility of probation or parole. In accordance with the jury's verdict, the trial court sentenced Skinner to life imprisonment without the possibility of probation or parole.

The Missouri Court of Appeals, Eastern District affirmed Petitioner's conviction and sentence on direct appeal and subsequently affirmed the denial of post-conviction relief.

During the state post-conviction proceedings, Skinner presented evidence that prosecuting attorney Nels Moss had entered a leniency agreement with Sereno Thompson in return for his false testimony against Skinner. Skinner submitted to the post-conviction court a written memorandum of nolle prosequi signed by Moss dismissing the charges against Thompson on May 7, 1986, the day the jury was deliberating whether to convict Petitioner and whether to sentence him to death.

2. Federal court proceedings

Ronald Skinner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254 alleging that he was deprived of his federal constitutional right to due process of law as a result of the prosecutorial misconduct that resulted from the prosecutor's knowing use of perjured testimony by Sereno Thompson and Edward Little and the prosecutor's failure to disclose agreements for leniency in exchange for Thompson's and Little's testimony.

Skinner presented to the district court a written memorandum filed by Moss dismissing the charges against Thompson on the day of the jury's deliberations in Skinner's case, an affidavit and a sworn statement from Thompson revealing that Thompson had presented false testimony in return for Moss' leniency on his criminal charges, an affidavit from Little stating that Little also had presented false testimony in return for Moss'

leniency on several criminal charges, and other evidence showing misconduct on the part of Moss.

On March 15, 2001, Magistrate Judge Thomas C. Mummert issued an unpublished report recommending that the petition be denied. Skinner filed a memorandum of objections to that report, arguing in substantial factual and legal detail why the recommendation should be rejected.

On September 10, 2001, District Court Judge Rodney W. Sippel issued an unpublished order adopting the magistrate's recommendation and dismissing the petition.

Petitioner had not filed an application for a certificate of appealability (COA), but at the same time the district court denied habeas relief, the district court also held that it

> will not issue a certificate of appealability since Skinner has not made a substantial showing of a denial of a constitutional right. See Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997)(substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issue differently, or the issues deserve further proceedings.")

Skinner v. Dormire, Cause No. 4:97CV761, Memorandum and Order, at 13 (E.D.Mo. 2001). Appendix B.

Petitioner filed a notice of appeal to the Eighth Circuit on April 17, 2002. In accordance with 28 U.S.C. Section 2254, Skinner filed an Application for a Certificate of Appealability. Attached to the COA, Petitioner submitted the Memorandum of Nolle Prosequi filed by the prosecutor in Thompson's case.

Ronald Skinner also submitted with his application Sereno Thompon's written recantation in the form of both an affidavit and a transcript of a sworn statement. In addition, Skinner submitted Edward Little's sworn affidavit that he testified falsely against Skinner at trial and he had received favorable treatment on criminal cases in exchange for his false testimony.

In the application, Petitioner cited this Court's decision in *Slack v. McDaniel*, 539 U.S. 473 (2000), a case that discussed the standards for the issuance of a COA. Skinner argued that he was

entitled to a COA because he was denied due process of law when the prosecutor knowingly presented the false testimonies of Thompson and Little in exchange for undisclosed leniency agreements. Petitioner noted in his application that "[j]urists of reason (1) would find it debatable whether a court could resolve these issues in a different manner and (2) would find it debatable whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling," *citing Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

On November 19, 2002, the Eighth Circuit entered a judgment denying Skinner's application for a certificate of appealability. The judgment did not either cite or apply *Slack* or its progeny in the Eighth Circuit, *e.g.*, *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997), *cert. denied,* 525 U.S. 834 (1998).

Petitioner Ronald Skinner now seeks a Writ of Certiorari from the Eighth Circuit's denial of relief and denial of a Certificate of Appealability.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I. Petitioner Ronald Skinner was denied his constitutional right to due process of law when prosecuting attorney Nels Moss[1] engaged in misconduct that included Moss' failure to disclose that he dismissed felony charges of two key state witnesses in exchange for their false testimony against Skinner at trial.

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[1] On June 26, 2003, the Center for Public Integrity released a national study about prosecution misconduct. The study reported that Nels C. Moss, the prosecutor in Ronald Skinner's case, was found by courts to have committed prosecutorial errors on twenty-five occasions, eight of which resulted in reversals. The report describes Nels Moss as "a recidivist breaker of the rules by which prosecutors are supposed to operate." Moss' record of prosecution misconduct was called "extreme." S. Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?*, (Center for Public Integrity, June 26, 2003)(http://www.publicintegrity.org).

Petitioner Ronald Skinner has been imprisoned for seventeen years for a crime he did not commit. In 1986, Petitioner was sentenced to spend his entire life in prison, without parole, following a conviction for first-degree murder. With overwhelming evidence of prosecutor misconduct, it is a travesty of justice to deny Petitioner habeas relief. The lower courts refused to allow Petitioner an opportunity to appeal the issue that Skinner was denied due process of law when prosecution misconduct so infected his trial as to render the outcome unreliable.

Two key prosecution witnesses testified falsely on the witness stand in exchange for prosecuting attorney Nels Moss' undisclosed leniency agreements in pending criminal cases. Both of the witnesses, Sereno Thompson and Edward Little, have now come forward to state under oath that they presented perjured testimony at trial in exchange for favorable treatment from the prosecution on criminal charges. Moss ~~did not~~ disclose the existence of the leniency agreements to the defense. In addition, Moss fabricated, solicited, and presented testimony he knew was false from Thompson and Little.

In the absence of the perjury by state witnesses Thompson and Little, Petitioner would not have been found guilty of first-degree murder. Skinner's murder conviction was based on the testimony of Thompson and Little. Other than these two witnesses, no other witness presented testimony to support the prosecutor's argument that Ronald Skinner planned and intended the shooting. One of the key state witnesses was a jailhouse informant named Sereno Thompson. The other key state witness was the actual instigator of the attack, Edward Little.[2]

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[2] Little had a prior history of threatening and assaulting the victim, Diane Green, with a handgun just one month prior to her death. He could have faced being charged with her murder. He had a very strong interest in receiving favorable treatment on numerous criminal charges pending against him. At Petitioner's trial, Little denied previously assaulting the victim with a gun. At the prosecutor's request, the court refused to allow Petitioner to present evidence of a police report to impeach Little that stated that Diane Green had brought criminal charges against Little because Little had assaulted her with a handgun, threatened to kill her if she did not give him money, and then robbed her of sixty dollars. This

A. The prosecutor presented testimony from Sereno Thompson he knew was false and he withheld evidence that Thompson had received leniency on criminal charges in exchange for his testimony.

Sereno Thompson told the jury that Ronald Skinner had informed him that Skinner had planned to shoot and had shot three people in a drug deal. Trial Transcript, at 797, 800. This was the only testimony presented that suggested the victim was killed in a "deliberate" manner, an element required for first degree murder, *see State v. Rousan,* 961 S.W.2d 831, 852 (Mo. 1998). At trial, Thompson denied the existence of any promises that he would receive favorable treatment from the prosecution in exchange for his testimony. Trial Transcript, at 806.[3]

The prosecution misconduct issues regarding Sereno Thompson were raised in the state post-conviction proceedings. In a state post-conviction motion filed on June 21, 1988, Mr. Skinner alleged that he

> was denied Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution ... in that his trial was tainted throughout with numerous instances of prosecutorial misconduct, to wit: ... [t]he prosecutor knowingly presented perjured testimony ... of Sereno Thompson ... and [t]he prosecutor failed to disclose to defendant the

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incident occurred only about one month (August 4, 1985) before she was killed on September 3, 1985. St. Louis Metropolitan Police Department Incident Report Number 850937732

[3] The district court also failed to consider Petitioner's claim that the prosecuting attorney presented a misleading closing argument to the jury about Sereno Thompson. During closing argument, the prosecutor vouched for Thompson's perjured testimony. Trial Transcript, at 1125. It was improper for the prosecutor to solicit perjured testimony and then vouch for its reliability during closing argument. *United States v. Bigeleisen,* 625 F.2d 203, 209 (8th Cir. 1980).

> promise of leniency made to Sereno Thompson in return for his testimony as evidenced by all charges against Thompson being dropped a few days after the defendant's conviction on this charge.

Skinner v. State of Missouri, Cause No. PCR 1827, Legal File at 69, Motion to Vacate Judgment (filed June 21, 1988, St. Louis City Circuit Court).

During Ronald Skinner's trial, Nels Moss wrote a court memorandum he apparently assumed no one would ever see. Moss filed a nolle prosequi memorandum in Sereno Thompson's pending case that dismissed the criminal charges against Thompson. Petitioner presented the nolle prosequi memorandum to the state post-conviction court to show that Nels Moss had dismissed the charges against Thompson on May 7, 1986.

On October 19, 1988, the state post-conviction court issued an Order finding that there was "no misconduct on the part of the prosecution in its method or manner of trial." *Id,* at Order on Rule 27.26 Motion, page 11. The state appellate court affirmed the denial of post-conviction relief.

The post-conviction court did not either mention or discuss the significance of the nolle prosequi memorandum that dismissed the charges against Thompson on the day the jury was deliberating whether to convict Petitioner of first degree murder and whether to sentence him to death. The state court held that the claims of prosecution misconduct were "insufficient to affect the outcome of the trial." *Id.*

During the federal habeas proceedings, Skinner presented his prosecution misconduct claim regarding Thompson's receipt of leniency from Moss in exchange for Thompson's false testimony. Skinner presented to the district court an affidavit and a sworn statement from Thompson that revealed he received favorable treatment on a pending felony charge in exchange for his testimony against Skinner and he had presented false testimony against Skinner at trial.

Petitioner also submitted to the district court a copy of a sworn affidavit and a copy of a sworn statement in which Thompson recanted his trial testimony. Under oath, Thompson

states that his testimony against Skinner at trial was not truthful. Appendix F, G. Thompson maintains that Nels Moss promised him that he would not be convicted of a pending criminal charge if he falsely testified against Skinner. *Id.* Moss promised Thompson that he would be discharged from the jail just after he testified and thus, he would not get into trouble for testifying in a false manner. *Id.* Nels Moss assured him that no one would find out that he had committed perjury. *Id.*[4]

Skinner also presented evidence that Thompson was released from the city jail soon after he testified against Skinner, was transferred to another correctional facility, and subsequently was released from confinement without serving the many years in prison he had feared he would have to serve, just as the prosecutor had promised. *Id.*

Skinner also presented Moss' nolle prosequi memorandum dismissing charges in Thompson's case. Appendix E.

The nolle prosequi memorandum was not available to Skinner's trial counsel because Moss did not disclose its existence. In addition, the memorandum was unavailable to the public because it was sealed away in Sereno Thompson's closed confidential court file.

During the state post-conviction proceedings, Petitioner's counsel obtained leave of court to access Thompson's sealed criminal record and discovered the existence of the nolle prosequi memorandum. Petitioner's counsel presented the memorandum to the state post-conviction court.

The state court, however, ignored the existence of this critical court memorandum and summarily held that there was no prosecution misconduct. Post-conviction Legal File, at 18.[5]

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[4] Thompson stated that the prosecutor had threatened him to not talk about his false testimony. Thompson came forward to reveal his perjury and the prosecution's favorable treatment because he has matured from the young person he was at the time of trial and his conscience was bothering him about what he had done. *Appendix* G. Sereno Thompson stated that he "volunteered to [testify regarding the perjury and the leniency agreement], because a wrong has to be righted." *Id.*

[5] To this date, no court has even mentioned the existence of the nolle memorandum, a critical piece of evidence that establishes convincing evidence of the existence of a leniency agreement.

The state post-conviction court finding that there was no prosecution misconduct is not entitled to a presumption of correctness in federal court. The state court ignored the nolle memorandum and thus, issued a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding." Section 2254(d)(2).

Likewise, the federal district court erred in overlooking the existence of the prosecutor's memorandum dismissing Thompson's charges. The memorandum directly conflicts with the prosecutor's statement that he did not have an agreement with Thompson and it confirms Thompson's sworn statements that there was an agreement.

The district court erred in holding that Petitioner procedurally defaulted the claim regarding Sereno Thompson's perjured testimony because he did not present the claim to the state courts for review and did not establish either prejudice or actual innocence to excuse the alleged procedural default. District Court Memorandum and Order dated September 10, 2001, at 7-8 Appendix B.

The issue that Nels Moss engaged in prosecution misconduct by providing Thompson with an undisclosed offer of leniency and by knowingly presenting Thompson's perjured testimony, however, was not procedurally defaulted. This issue was presented to the state court in the post-conviction petition during the state post-conviction proceedings. Post-conviction Legal File, at 69.

Petitioner attempted to present evidence of these claims in state court, but the court refused to consider the claim of prosecution misconduct by stating that prosecutorial misconduct "cannot be consider[ed] by the Court" because the only issue it would consider was "the professional conduct of [petitioner's] attorney" and that the court was "not intending to get into the professional conduct of the prosecutor in the case." Post-Conviction Hearing, at 219-220. Appendix I. In its decision, the post-conviction court summarily found no prosecution misconduct. Post-Conviction Legal File, at 18.

The issue of prosecution misconduct surrounding Sereno Thompson's testimony was not procedurally defaulted because the issue was presented to the state court in a timely manner. Skinner

raised the issue in state post-conviction court. Unfortunately, the post-conviction court ruled that such claims were not an appropriate inquiry for post-conviction review. There was no other judicial remedy by which to raise the claim in state court. Thus, the district court erred in dismissing the issue as procedurally defaulted.

In the absence of Thompson's perjured testimony, there was no evidence to support a conviction for first-degree murder. Sereno Thompson was the only witness who testified at trial that Petitioner killed the victim in a premeditated and deliberate manner. Whether Thompson was a reliable and truthful witness was determinative of Skinner's guilt or innocence and thus, habeas relief is warranted. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

There was no compelling physical evidence that Petitioner committed murder. The medical examiner could not rule out the possibility that the shots were fired from Little's front seat position because she could not "tell [with] certainty, where exactly any of these bullets were fired from." Trial Transcript, at 654. There was no forensic evidence that Skinner fired the shots. The weapon was never recovered for testing. Thus, there was no physical evidence that Ronald Skinner was responsible for the shooting.

In addition, Skinner made no incriminating statements. There was no evidence from law enforcement authorities that Skinner had incriminated himself. Only Thompson claimed that Skinner had made an incriminating statement to him. Thompson now has recanted this testimony.

St. Louis City Assistant Circuit Attorney Nels Moss knowingly used perjured testimony presented by Sereno Thompson. In addition, Nels Moss intentionally failed to disclose evidence of the existence of a leniency agreement entered by his authority at the St. Louis Circuit Attorney's Office in exchange for the testimony of Thompson.

Ronald Skinner's credibility was a key issue at trial. Sereno Thompson's testimony was used in an improper manner to attack Ronald Skinner's credibility. As the Missouri Court of Appeals held:

> Defendant was the only defense witness as to the events of September 3, 1985, which led to the

> shootings in Little's car. His credibility was therefore a crucial issue in the case with regard to the determination of whether he was guilty.

State v. Skinner, 734 S.W.2d 877, 883 (Mo. App. 1987).

Petitioner was denied due process of law when prosecuting attorney Nels Moss presented false evidence at trial and failed to disclose the existence of the leniency agreement with Thompson.

B. The prosecuting attorney, Nels Moss, presented testimony from Edward Little that he knew was false and he withheld evidence that Little received leniency on criminal charges in exchange for his false testimony.

During the federal habeas proceedings, Edward Little signed an affidavit sworn under oath stating that he received favorable treatment from the prosecutor on numerous criminal charges, that he received assistance with housing, and that he testified falsely against Petitioner. Appendix H. This claim was not raised in state court in a timely manner for the post-conviction proceedings.

Factors external to the defense, however, impeded counsel's efforts to comply with the state's procedural rule and thus there exists "cause" excusing any procedural default. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Interference by officials made compliance with the state's procedural rules impracticable. *Id.*

Petitioner established cause to excuse a procedural default because the prosecution's concealment of evidence precluded Petitioner from presenting the claim to the state court. *Strickler v. Green*, 527 U.S. 263, 289 (1999)(petitioner established cause for failing to raise *Brady* claim because the prosecutor had withheld exculpatory evidence).

The United States Circuit Courts of Appeals, including the Eighth Circuit, have found that the prosecutor's failure to disclose evidence satisfies the "cause" requirement. *See, e.g., White v.*

Helling, 194 F.3d 937, 924-44 (8th Cir. 1999)(withholding of exculpatory evidence contributed to petitioner establishing cause for failure to raise *Brady* claim prior to federal habeas); *Parkus v. Delo*, 33 F.3d 933, 938, 940 (8th Cir. 1994)(cause existed to excuse procedural default because the prosecutor failed to furnish all records favorable and material to the defense).

Procedural default does not bar review of a claim when a petitioner did not have the facts needed at trial to establish that a witness committed perjury. *United States v. Biberfeld*, 957 F.2d 98, 104 (3d Cir. 1992).

"To reward the government for its skill in keeping exculpatory evidence suppressed through the date of the affirmance [of conviction on direct appeal] would only encourage abuse." *Ely v. Matesanz*, 983 F.Supp.2d 21 (D.Mass. 1997).

State interference to establish the claim that Moss knowingly presented Little's false testimony at trial included: Moss' withholding of the evidence, Moss' use of perjured testimony at the state post-conviction hearing to conceal the truth, and the state court's failure to afford Petitioner a full and fair hearing on the claim of prosecution misconduct.

Petitioner established "prejudice" to excuse a procedural default because Little's false testimony secured with promises of favorable treatment affected the jury's judgment. Little's testimony challenged Skinner's testimony that Skinner was acting in self-defense. The outcome of the trial would have been different had the jury known that Little testified falsely on the witness stand in exchange for favorable treatment from the prosecutor.

Skinner was denied his constitutional right to due process of law as a result of prosecution misconduct from Moss' presentation of false testimony and from Moss' failure to disclose the existence of the leniency agreement with Little.

C. The Eighth Circuit's dismissal of Skinner's appeal, without allowing him an opportunity to file briefs or argue the case, is a decision that conflicts with decisions of this Court and with decisions of other Courts of Appeals.

The decision of the United States Court of Appeals for the Eighth Circuit in Ronald Skinner's case is contrary to principles of federal jurisprudence and constitutional law. The Eighth Circuit has decided an important federal question in a way that conflicts with the relevant decisions of this Court and with the relevant decisions of the United States Courts of Appeals on the same important matter.

Well-established United States Supreme Court precedent holds that due process is violated when the prosecuting attorney presents perjured testimony. *Mooney v. Holohan,* 294 U.S. 103, 112 (1935)(per curiam)(due process is denied when the "State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.").

In addition, the prosecution's suppression of evidence favorable to an accused violates due process where the evidence is material to issues of guilt or punishment. *Brady v. Maryland,* 373 U.S. 150 (1972). This Court has expanded the prosecutor's duty to include the disclosure of favorable evidence that would impeach a government witness, including evidence of promises of leniency and inducements to testify. *Giglio v. United States,* 405 U.S. 150 (1972). Whether a state witness was a reliable and truthful witness is a matter that can determine a defendant's guilt or innocence. *Napue v. Illinois,* 360 U.S. 264, 269 (1959).

The knowing use of perjured testimony by a prosecutor requires the conviction be set aside if there is a reasonable likelihood that the false testimony affected the judgment of the jury. *United States v. Agurs,* 427 U.S. 97, 103 (1976).

This Court's precedent in *Agurs* was adopted by the Eighth Circuit in holding that a due process violation occurs when the prosecution uses perjured testimony and "'there is any

reasonable likelihood that the false testimony could have affected the judgement of the jury.'" *Bowman v. Gammon,* 85 F.3d 1339, 1343 (8th Cir. 1996), *cert. denied,* 520 U.S. 1128 (1997), *citing United States v. Agurs,* 427 U.S. 97, 103 (1976). The Eighth Circuit has recognized that it is important for the jury to have full knowledge of any agreements a witness had with the government in order to assess the witness' credibility. *United States v. Bigeleisen,* 625 F.2d 203, 208 (8th Cir. 1980)(government's failure to reveal the full extent of an agreement with key witness violated due process).

"Few things are more repugnant to the constitutional expectations of our criminal justice system than covert perjury, and especially perjury that flows from a concerted effort by rewarded criminals to frame a defendant." *Northern Mariana Islands v. Bowie,* 243 F.3d 1109, 1114 (9th Cir. 2001).

The Eighth Circuit panel's decision dismissing the appeal is contrary to this Court's precedents beginning with *Mooney, Brady,* and *Giglio,* and is contrary to numerous circuit appellate court decisions, *see e.g., Crivens v. Roth*, 172 F.3d 991 (7th Cir. 1999)(due process violation found because the prosecutor had failed to disclose evidence undermining the credibility of a key state witness); *United States v. Scheer*, 168 F.3d 445 (11th Cir. 1999)(prosecutor failed to disclose evidence of threats the prosecutor made to key government witness); *East v. Johnson*, 123 F.3d 235 (5th Cir. 1997)(*Brady* violation for failure to disclose material evidence of government witness' mental state); *United States v. Bigeleisen,* 625 F.2d 203, 208 (8th Cir. 1980)(government's failure to reveal the full extent of an agreement with key witness violated due process).

The foregoing decisions reveal that prosecution misconduct is a serious allegation warranting habeas relief when it is proved to have resulted in a wrongful conviction. Ronald Skinner was deprived of his federal constitutional right to due process of law as a result of the prosecutor's misconduct. In the absence of the prosecutorial misconduct and if favorable evidence had been disclosed, the outcome of the trial would have been different. Instead, the trial resulted in the conviction of an innocent man. Ronald Skinner's conviction and sentence are long overdue for reversal.

II. The lower federal courts erred in failing to grant Petitioner an evidentiary hearing to present additional evidence in support of his claims of prosecution misconduct.

If relief is not granted outright, Ronald Skinner should be granted an evidentiary hearing to resolve contested factual issues in his case. Petitioner has not "failed to develop the factual basis of a claim in State court proceedings." 28 U.S.C. Section 2254(e)(2).

Instead, Petitioner diligently presented evidence that he could find about the prosecution misconduct at the state post-conviction proceeding. In addition, Petitioner cannot be faulted for not presenting all evidence now available regarding the prosecutorial misconduct because Moss withheld this information from him.

In *Williams v. Taylor,* 529 U.S. 420, 435 (2000), this Court held that a petitioner who diligently attempted to present evidence in state court has not failed to develop a factual predicate merely because the petitioner was unable to present the evidence in state court. "[A] person is not at fault when his diligent efforts to perform an act are thwarted, for example, by the conduct of another or by happenstance." *Id.*, at 432.

The facts presented in the *Williams* case that were found to warrant an evidentiary hearing are remarkably similar to the facts presented by Skinner. In particular, this Court held that Michael Williams was entitled to a federal hearing because he had shown a sufficient degree of diligence regarding a claim that the prosecution failed to provide material evidence. *Id.*

Petitioner was unable to present all evidence of prosecution misconduct that currently is available to the state court because the prosecutor concealed evidence and the witnesses had failed to testify truthfully at trial. The inability of Petitioner to develop these claims of prosecution misconduct was attributable to the misconduct of the prosecutor. Congress did not intend to "bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court." *Id.*, at 434-435.

In addition, Petitioner diligently attempted to present evidence of prosecution misconduct in the state court, but the state post-conviction court refused to permit him to present such evidence. Post-conviction Hearing Transcript, at 219-220. Appendix I. The state post-conviction hearing was not adequate to resolve Petitioner's claims because the state court did not allow Petitioner to raise evidence of prosecution misconduct. The court limited the post-conviction proceeding only to claims of ineffective assistance of counsel and stated that it would not consider the claim of prosecution misconduct because it was inappropriate to "bring the prosecutor under oath and ask him how he prepared his case and what he revealed and why he took certain actions, and this Court is not going to indulge you in that." *Id.*

During the underlying federal habeas proceedings, the United States Magistrate Judge found "[i]t appears that whether Little testified falsely at Petitioner's trial is in dispute." *Skinner v. Dormire,* Cause No. 4:97CV761, Memorandum and Order, at 3 (E.D. Mo. September 19, 2000).

This finding by the Magistrate Judge shows the existence of a factual dispute regarding Little that required resolution in an evidentiary hearing. *Blackmon v. Scott,* 22 F.3d 560, 566 n. 20 (5th Cir. 1994)(when there is a dispute regarding the promise of leniency in exchange for testimony from a state witness, an evidentiary hearing is required).

Relevant facts are in dispute because Petitioner presented allegations of prosecution misconduct that Respondent has not conceded are true. A hearing is necessary on Petitioner's claim that he was denied due process of law by the prosecutor's use of false evidence and by the prosecutor's suppression of exculpatory evidence, i.e. the leniency agreements.

Ronald Skinner "'alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing,' [and thus,] he is entitled to a hearing in federal court." *Culkin v. Purkett,* 45 F.3d 1229, 1234 (8th Cir. 1995)(citation omitted).

III. The federal district and appellate courts failed to apply the proper standard in considering whether to issue a certificate of appealability.

The Eighth Circuit panel should have granted a Certificate of Appealability because it is, at the very least, a matter of debate (1) whether there is a valid claim of the denial of the constitutional right to due process of law as a result of the prosecuting attorney's failure to disclose to the defense the existence of false testimony presented pursuant to a leniency agreement with Sereno Thompson and Edward Little, as required by *Mooney, supra; Brady, supra; Giglio, supra;* and *Napue, supra* and (2) whether the district court was correct in its procedural ruling that Petitioner's claim of prosecution misconduct was procedurally defaulted, s*ee Slack v. McDaniel,* 529 U.S. 473, 484 (2000).

A. The district court's denial of a COA was erroneous for the reason found in *Miller-El.*

Miller-El v. Cockrell, 123 S.Ct. 1029 (2003) was not available at the time the Eighth Circuit denied Skinner's application for a certificate of appealability. This Court's recent decision in *Miller-El* could provide the Eighth Circuit and the district court with valuable guidance for resolution of such applications. *See, e.g., U.S. ex rel. Martin v. Pierce*, Case No. 01C7657 (N.D. Ill., April 7, 2003) (evaluating a COA application pursuant to the standards of *Miller-El*).

Noting that a COA is necessarily sought in a context in which the petitioner has lost on the merits and the district court presumably believes that it acted appropriately in so ruling, this Court wrote in *Miller-El*, 123 S.Ct. at 1040: "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." Thus, "a court of appeals should not decline the application for a COA merely because it believes that the applicant will not demonstrate an entitlement to relief." *Id.,* at 1039.

The ruling by the district court dismissing Skinner's habeas corpus petition was not correct because it failed to adequately address Petitioner's claim of prosecution misconduct. It was surely debatable whether the district court's decision was correct. Skinner should be permitted to at least brief the merits of his strong claims supported by overwhelming evidence that raises a substantial showing of the violation of the constitutional right to due process of law.

The district court's application of the *Cox v. Norris* case in support of its ruling that it would not issue a COA is flawed. The *Cox* methodology of reviewing the merits of the case to determine whether to grant a COA is improper for the same reason as this Court announced in *Miller-El.* The standard presented by the Eighth Circuit in *Cox v. Norris* is no longer valid after this Court's decision in *Miller-El.* It was improper for the district court to rely on a standard that required the resolution of the merits of the case in determining whether to issue a COA.

A review of the record reveals that the district court denied the merits of Skinner's habeas petition and then immediately stated it would not issue a COA. The district court did not consider argument from either party to this cause of action. From a silent record it can only be assumed that the district court's denial of a COA was based upon the denial of the underlying habeas case.

Only after reaching the conclusion that Skinner should not be granted habeas relief did the court declare, in one short sentence with citation only to *Cox v. Norris*, that a COA was not warranted. Appendix B. The court did not explain why its own determination that petitioner's claim lacked merit compelled the conclusion that no "reasonable jurist" could find otherwise. *Id.*

One court's determination that a habeas petitioner's underlying claim lacks merit is insufficient, without more, to establish that a COA should not issue. Instead, entitlement to a COA turns simply on whether the petitioner's claim is sufficiently plausible that it "'deserve[s] encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S. at 893). Were that not the case, only those habeas petitioners who ultimately prevail on appeal would be allowed to pursue an appeal in the first place, and the COA process would be converted, paradoxically,

into the appeal itself.[6] That is precisely what the district court did here: It first rejected petitioner's claim on the merits and then summarily concluded, on that basis and without any additional analysis, that petitioner had not made the requisite "substantial showing" for a COA.

The district court jumped straight from a rejection of petitioner's claim on the merits to a statement that it would not grant a COA, a leap that leaves no doubt that the court of appeals failed to give any attention to the distinct "threshold inquiry" required by *Slack* v. *McDaniel*, 529 U.S. 473, 482 (2000).

B. Eighth Circuit's denial of a COA was erroneous.

On November 19, 2002, a three-judge panel of the Eighth Circuit Court of Appeals summarily denied, without discussion, Petitioner's Application for a Certificate of Appealability, which was filed pursuant to 28 U.S.C. Section 2253(c)(1)(A), and dismissed the appeal without requiring briefs to be filed.

The Eighth Circuit considered Petitioner's Application for a Certificate of Appealability, but offered no statement of the standard it used to conduct a review of the application. If the Eighth Circuit was acting as it does in cases for which it posts written decisions, the Eighth Circuit reviewed the merits of Petitioner's case to conclude that he would not receive a COA. *See, e.g., Cox v. Norris, supra.* The practice of reaching the merits of the habeas claims in order to decide whether to issue a COA is a practice that was condemned by this Court recently in *Miller-El.*

The Eighth Circuit offered no indication in Skinner's case that it was using the correct standard for the consideration of a COA. The panel below deviated from the standards this Court clearly set forth in *Slack v. McDaniel*, 529 U.S. 473 (2000) and

---

[6] Indeed, if mere rejection of the claim by a single federal court were sufficient, no COA would ever issue because every request for a COA is necessarily preceded by a federal court's rejection of the claims in the underlying petition. *See Barefoot*, 463 U.S. at 893 n.4. This point is most plain where, as permitted under Fed. R. App. P. 22(b)(1), the petitioner seeks a COA from the very court that has denied his petition.

Barefoot v. Estelle, 463 U.S. 880 (1983).[7] According to *Barefoot*, a COA is to issue for a claim denied on the merits if it is a claim that "a court could resolve ... in a different manner," is "adequate to deserve encouragement to proceed further," or is not "squarely foreclosed by statute, rule, or authoritative court decision." *Barefoot*, 463 U.S. at 893, n.4. Where the district court dismisses a petition or claim based on procedural grounds, the court is to engage a two-part inquiry pursuant to *Barefoot*. *Id.*

A review of the plain language of the COA statute is important to the analysis regarding whether the lower courts' rulings were correct. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). The statutory language is clear that entitlement to a COA turns not on whether a petitioner can establish ultimate entitlement to relief prior to appeal, but on whether the petitioner can make a "*substantial showing* of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2) (emphasis added), so as to warrant permitting an appeal.

This Court has described the analysis as a "threshold inquiry," *Slack*, 529 U.S. at 482, not a full review of the merits:

> "In requiring a . . . 'substantial showing of the denial of a federal right,' obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"

---

[7] *Barefoot* addressed the standards for a certificate of probable cause ("CPC"), which was replaced in 1996 by the COA provisions of AEDPA. This Court has made clear, however, that "[e]xcept for substituting the word 'constitutional' for the word 'federal,' section 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*." *Slack*, 529 U.S. at 483. Accordingly, this Court has relied upon *Barefoot* when construing and applying the standard for a COA. *Slack*, 529 at 483-84.

Barefoot, 463 U.S. at 893 n.4 (citations omitted, emphasis in original).

Indeed, the clear language of the statute establishes that a petitioner's entitlement to pursue an appeal is not conditioned on persuading the appellate court, in advance, that the appeal must ultimately prevail, but rather on making a "substantial showing" of the denial of a constitutional right pertaining to the underlying constitutional claim. 28 U.S.C. § 2253(c)(2).

As this Court held in *Miller-El*, the issue is not whether Petitioner is going to win. "At the COA stage, . . . a court need not make a definitive inquiry into [a resolution of the issues]. As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits." *Miller-El*, 123 S.Ct. at 1042 (citations omitted). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id.* "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*, at 1040.

Congress required a "substantial showing of the *denial of a constitutional right*" (emphasis added). Congress did not require a substantial showing of the right to relief. Distinguishing "denial of a constitutional right" from "entitlement to relief" is wholly consistent with this Court's jurisprudence regarding AEDPA.

As this Court has explained, a state prisoner whose habeas petition has been denied by a federal district court meets the standard for a COA if the petitioner shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented [are] 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). That is, a COA must issue where the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.*

Given that this Court and numerous circuit appellate courts require that trials be free from prejudicial prosecution misconduct that casts doubt on the reliability of the outcome of the trial, it is beyond peradventure that this is an issue that is debatable among reasonable jurists. Petitioner's position is supported by the logic of the cases that this Court has decided, as well as by the clear rule in all of the circuits. Skinner's claim of prosecution misconduct clearly qualifies as being "debatable among jurists of reason."

Petitioner made a substantial showing of the denial of his constitutional rights and therefore, a Certificate of Appealability should have been granted in accordance with 28 U.S.C. Section 2253(c). Jurists of reason would find it debatable whether the habeas petition stated valid claims of the denial of the constitutional right to due process and whether the district court was correct in denying the petition on procedural grounds. *Slack*, 529 U.S. at 484.

C. District court's COA denial was entered when the issue was not ripe for review.

The district court did not consider an Application for a Certificate of Appealability when it denied issuing a COA because Petitioner had not filed an application. Such an application is appropriate only after habeas relief has been denied by the district court.

Instead, the district court discussed the merits or procedural aspects of Skinner's case and then summarily concluded in a short one-sentence statement with one citation to authority that it would not issue a Certificate of Appealability.

The district court denied a certificate of appealability at the time it denied Petitioner's habeas corpus petition. Petitioner had not filed an application for a certificate with the district court. The district court summarily found no substantial showing of a denial of a constitutional right. Memorandum and Order, at 13. Appendix B.

In *Murphy v. Ohio,* 263 F.3d 466 (6th Cir. 2001), the Sixth Circuit held that a summary denial of a certificate of appealability on all issues without individualized consideration and without any request for a COA was improper. The Sixth Circuit found:

> the district court ... failed to undertake the individualized determination of each claim presented by petitioner in considering whether to grant a COA [certificate of appealability] under 28 U.S.C. Section 2253(c). Rather, the lower court denied [petitioner] a COA before [petitioner] had even applied for one, and failed to provide any analysis whatsoever as to whether [petitioner] had made a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2); *Slack,* 529 U.S. at 483.

Id., at 467. The Fourth Circuit remanded the case for reconsideration of each claim raised by the petitioner, in light of the standards announced in *Slack. See also Weeks v. Angelone,* 4 F.Supp.2d 497, 537 (E.D. Va. 1998), which states that the COA issue is not ripe until the petitioner applies for a certificate of appealability.

D. A COA should have been granted.

Jurists of reason would find it debatable (1) whether a court could resolve the issue in a different manner and (2) whether the petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural rulings. *Slack,* 529 U.S. at 484. The lower courts should have granted Skinner a COA.

In lieu of hearing further argument on Petitioner's certiorari petition, this Court could order a remand for the panel to undertake a proper assessment of the appealability of Skinner's claims. An order to grant the certiorari petition, vacate the lower court's judgment, and remand for further consideration of this Court's cases would assist the court below by offering guidance on a particular issue that it does not appear to have fully considered. See *Stutson v. United States,* 516 U.S. 193, 194 (1996) (*per*

curiam). *See also Hohn v. United States*, 524 U.S. 236, 251 (1998)(Court has jurisdiction to review denial of COA "to carry out our normal function of reviewing possible misapplications of law by the courts of appeals.")

CONCLUSION

In view of all of the foregoing reasons, and for other reasons seen fit by this Honorable Court, Petitioner Ronald Skinner respectfully requests that this Court grant the Petition for Writ of Certiorari herein and reverse the judgment of the United States Court of Appeals for the Eighth Circuit that denied an Application for a Certificate of Appealability and dismissed the appeal; or remand for further consideration in light of this Court's precedents; or for such other relief as this Court deems just and appropriate.

RESPECTFULLY SUBMITTED,

/s/ Cheryl A. Rafert

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Attorney at Law
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June 30, 2003

ATTORNEY FOR PETITIONER

APPENDIX

A	Eighth Circuit's Judgment Denying Application for a COA
B	Excerpts from District Court Order of September 10, 2001
C	Excerpts from Order on State Post-Conviction Motion
D	Eighth Circuit's Order Denying Petition for Rehearing
E	Memo of Nolle Prosequi in Sereno Thompson's Case
F	Excerpts from Sereno Thompson's Affidavit
G	Excerpts from Sereno Thompson's Sworn Statement
H	Excerpts from Edward Little's Affidavit
I	Excerpts from State Post-Conviction Hearing Transcript

A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2062

Ronald Skinner,	*	
Appellant,	*	Appeal from the United States
vs.	*	District Court for the
David Dormire,	*	Eastern District of Missouri
Appellee.	*	

Before WOLLMAN, FAGG, and MELLOY, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

November 19, 2002

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

RONALD SKINNER,	)	
Petitioner,	)	
v.	)	No. 4:97CV761 RWS
DAVID DORMIRE,	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the petition of Ronald Skinner ("Skinner") for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. (page 1)

****

B. Skinner's prosecutorial misconduct claims are barred by procedural default. (page 7)

****

Because Skinner never fully and fairly presented his federal statutory claims to the state courts for review, he has procedurally defaulted on his prosecutorial misconduct claims of his habeas petition. (page 8)

****

In the present case, Skinner has not made a showing of prejudice or actual innocence to establish that a fundamental miscarriage of justice has resulted. (page9)

****

In order to overcome procedural default, Skinner must show cause *and* prejudice or miscarriage of justice. Skinner has failed to meet these standards. (page 10)

****

IV. Certificate of Appealability

Finally, the Court will not issue a certificate of appealability since Skinner has not made a substantial showing of a denial of a constitutional right. See Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997)(substantial showing requires that "issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings.")

Accordingly,

IT IS HEREBY ORDERED ... (page 13)

****

/s/Rodney W. Sippel

UNITED STATES DISTRICT JUDGE

Dated this 10th day of September, 2001. (page 14)

C

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

STATE OF MISSOURI

RONALD SKINNER,	)	FILED OCT 19, 1998
Movant,	)	
vs.	)	PCR No. 1827
STATE OF MISSOURI,	)	Cause No. 851-2125
Respondent.	)	

ORDER ON RULE 27.26 MOTION

****

The Court further finds from the testimony adduced that there was no "deal" [between the prosecutor and Sereno Thompson.](page 7)

****

The Court upon review of the transcript finds no misconduct on the part of the prosecution in its method or manner of trial. (page 11)

****

For the foregoing reasons, it is ordered and adjudged that movant's motion for relief be overruled and denied in all respects.

SO ORDERED:

/s/ James J. Gallagher

Circuit Judge, Division No. 5

Oct. 19, 1988

D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2062

Ronald Skinner,	*	
Appellant,	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
David Dormire,	*	En Banc
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

January 30, 2003

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

E

IN THE

CIRCUIT COURT

CITY OF ST. LOUIS

STATE OF MISSOURI

vs.

SERENO THOMPSON

CHARGE: Failure to Return to Confinement

CAUSE NO. 851-2345

Comes now Nels C. Moss, Assistant Circuit Attorney and enters a memorandum of Nolle Prosequi in the above-entitled cause for the reason that the State elects not to proceed.

Respectfully submitted,

/s/Nels C. Moss

NELS C. MOSS

Assistant Circuit Attorney

FILED

May 7, 1986

F

AFFIDAVIT OF SERENO THOMPSON

I, Sereno Thompson, after first being duly sworn, depose and state:

****

4. Nels Moss told me that if I told him what Ronald Skinner and I talked about, he (Nels Moss) would work on getting my escape charge dismissed.

5. Nels Moss told me that when I testified and was asked if any promises or deals had been made, I was supposed to say "no."

6. Ronald Skinner had told me that the black man in the car had a gun and that he (Ronald Skinner) grabbed the gun because he thought the black man was going to shoot him.

7. Ronald Skinner told me that there was a struggle and the gun went off.

8. Nels Moss told me that Ronald Skinner had the gun to begin with and shot the people in the car....

9. Nels Moss told me what to say at Ronald Skinner's trial, but it was not what Ronald Skinner had actually told me....

10. Nels Moss told me what to testify to in return for getting my charge dismissed.

11. I told Nels Moss I would be fibbing in court to say what he (Nels Moss) wanted me to say. He told me that no one would know the difference.

12. Nels Moss took me to restaurants outside the jail and courthouse to eat meals. He gave me plenty of cigarettes, soda, and food. The food I got through Nels Moss was much better than the jail food.

13. I met with Nels Moss several times and worked on memorizing what Nels Moss wanted me to say at Ronald Skinner's trial.

****

18. I testified the way I did because I wanted to get the deal that Nels Moss was promising me.

****

20. Circuit Attorney George Peach was saying he was going to prosecute me to the fullest extent of the law and make an example of people like me who escaped from confinement. I was expecting I would do five (5) years of prison time consecutive to the time I already had to serve.

21. On May 7, 1986, after I testified in Ronald Skinner's case, the escape charge was dismissed.

22. I returned to prison to serve my four (4) sentences for property crimes, which were six (6) years each. I was released on parole forty-five (45) days after I got back to prison.

23. If Nels Moss had not promised me a deal, I would not have testified against Ronald Skinner.

24. After I testified, Nels Moss sent me about seven (7) letters threatening me not to talk with anyone about my testimony.

****

/s/Sereno Thompson

Sereno Thompson

Subscribed and sworn to before me on this 30th day of September, 1999.

G

STATEMENT

OF

SERENO THOMPSON

Sworn Statement of Sereno Thompson taken on September 6, 2000, at the Algoa Correctional Center, by Melinda Adolphson, Certified Shorthand Reporter…

(Questions by Ms. Rafert and answers by Sereno Thompson, unless otherwise indicated.)(page 1)

****

A. George Peach was the prosecuting attorney on that [charge of escape from confinement], and he was saying to go for the maximum, which would have been five years, and it would have been running consecutive to what I had already had, which was a six-year sentence from Dent County. (page 8)

****

Q. …what did Nels Moss say that he could do for you?

A. He was saying he could get the escape charge withdrawn, my charges dismissed. I would be sent back to St. Mary's Honor Center, and then from there transported back to Missouri Department of Corrections for a new release date or whatever. (pages 8-9)

****

Q. …[W]hat did you think you might get for testifying against Ron Skinner?

A. Well, I figured I'd get released from that charge and probably released within 60 days on parole... I know after I testified for the State against Ronald Skinner, the same evening of the day after testifying, they transported me back to St. Marys Honor Center, was in the hole there for four days, was transported back to the Missouri Department of Corrections in Jefferson City, the walls, and I was there for four days. And then I was

transported from there to Algoa Correctional Center on that fourth day. Forty days later I was released on a conditional release. (page 9)

****

A. … [Nels Moss] could get the case – the [escape] charge dismissed if I would go in and testify to what he wanted me to say… [T]o say that Ron had brought the gun out first, and then the struggle had ensued. (page 11)

****

A. Well, I told [Nels Moss] I thought it would be – I would get in some kind of trouble if I got up there and told a lie or something. He said, No. He said, You won't have to worry about none of that. He said, You won't even be here after testifying. You will be gone. They can't do nothing to you about it. (page 12)

****

Q. And did you testify the way Nels Moss told you to?

A. Yeah.

Q. And was that the truth?

A. No. (page 12)

****

Q. Did [Nels Moss or his investigators] buy you lunch or dinner or something?

A. Yeah. We had lunch in the restaurant there that one time. Then another time we had gone to a place called Cleopatra's. It's a restaurant or a bar or something like that. They offered to supply me with alcohol, which I don't drink. And we had a brunch… And then they had gotten orders from there for food later in the evening. I had my evening meal in Nels Moss – Nels Moss's office on the third day. Then on the the fourth day I had lunch in his office.

Q. What did you think of that kind of treatment? Is that the ordinary treatment you get when you're in jail?

A. No. You don't get treated like that in city jails or county jails.... I didn't know that I could have those meals anywhere other than city jail. I thought I was supposed to be taken back over [to jail] for lunch or evening meal or whatever. (pages 17-18)

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Q. Was there anything else that Nels Moss had given you during the times that you would visit with him before you testified?

A. Cigarettes and sodas and food...

Q. And did Nels Moss ever say anything to you like, if you were asked by anybody when you were testifying whether there had been any promises made to you? Did Nels Moss say what you should say?

A. I was supposed to say no. (pages 20-21)

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Q. And what you said at Ronald Skinner's trial, was that what Ronald Skinner had actually told you?

A. No.

Q. And did Ronald Skinner say he had the gun to begin with?

A. No.

Q. And did Ronald Skinner say that he intentionally shot two people?

A. No. He didn't do it intent – he was fighting over the gun, trying to keep from being shot himself....

Q. And all those things that you testified about, that's just based on what Nels Moss told you to say, is that right?

A. That's everything what he's told me to say. (pages 21-22)

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A. Well I told [Nels Moss] that I had watched T.V. before, and they said that on the T.V. shows that if you got up there and lied, then you would be perjuring yourself, and that you can get into trouble for it. And he said, No. You ain't going to get into no trouble for it, because I'm the prosecutor.

Q. Would you have testified against Ronald Skinner if Nels Moss had not made the deal with you to get the escape charge dropped?

A. No. (pages 23-24)

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Q. Why is it now that you would want to come forward?

A. Well, I have a conscience, and I sometimes have bad dreams that maybe that would have been – that could have been me there. And we – Ron would be in my place, and I would be in his place. I would feel that that was an unjustified and set up little deal against me. I wouldn't want that to happen to me.

And if Ron did do something wrong, then he did it to protect himself and not the other way around, the way that Nels Moss is trying to say that he intentionally shot those people.... I mean, [Ron shouldn't be] in prison for something that was – may have been self-defense in the first place....

Q. And that deal, that was a pretty good deal for you basically?

A. That there while I was younger then and didn't really think about the consequences or how I would feel 10 or 15, 20 years from then. He offered me the deal, and I took it. And he told me that I wouldn't be in no kind of trouble. That the lie would be covered up... (pages 27-28)

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A. ... I volunteered to [make this statement], because I feel that a wrong has to be righted. (page 35)

H

AFFIDAVIT OF EDWARD LITTLE

I, Edward Little, after first being duly sworn, depose and state:

1. I testified as a prosecution witness at the trial of Ronald Skinner in 1986.

2. The prosecuting attorney, Nels Moss, helped me get probation on criminal cases in exchange for my testimony against Ronald Skinner. Nels Moss helped me with several criminal cases that were brought against me from 1985 until 1989 by getting the charges dropped. Nels Moss kept me from getting charged with several crimes after I had been arrested from 1985 until 1989. Nels Moss also helped get me a motel to live in for awhile prior to my testifying against Ronald Skinner.

3. Nels Moss did not like it that Ronald Skinner was out on bond before he went to trial. Nels Moss told me Ronald Skinner was going to be released on bond and that I should be in court for this. I came to court. Nels Moss wrote up a complaint saying that Ronald Skinner had threatened me at the courthouse. But, this was not true. Ronald Skinner did not threaten me. I testified at trial that Ronald Skinner had threatened me at the courthouse, but this was not true.

4. At the time of the shooting, I was high on drugs. I had been smoking PCP from Friday until that Tuesday. Diane Green, Janine Green and I had all been doing drugs during the Memorial Day weekend. We had not had any sleep. I could not remember what had happened at the time of the shooting. Nels Moss coached me how to testify.

5. The foregoing is true and correct to the best of my knowledge and belief.

/s/Edward Little

Edward Little

Sworn and subscribed to before me, a notary public, on this 15th day of December, 1999.

I

IN THE MISSOURI COURT OF APPEALS

EASTERN DISTRICT

RONALD W. SKINNER,	)
Movant,	) Mo. Ct. of Appeals
v.	) No. 55814
STATE OF MISSOURI,	)
Respondent.	)

TRANSCRIPT OF RECORD ON APPEAL

July 22, 1988

in Division 23 of the Circuit Court of the City of St. Louis

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(Excerpt from pages 219-220)

MR. SINDEL [Skinner's attorney]: Your Honor, my position would be that on a 27.26 the allegations concerning court error or prosecutorial misconduct error can be considered by this Court.

THE COURT: I cannot consider it by the Court. The issues I have to deal with under 27.26 is the professional conduct of his attorney.

MR. SINDEL: Your Honor, but I believe that a –

THE COURT: I'm not intending to get into the professional conduct of the prosecutor in the case. That's not an issue.

MR. SINDEL: I think for example if it was disclosed that the prosecutor purposely hid evidence or made deals with witnesses in exchange for their testimony that is something that is available for review on –

THE COURT: I don't believe it is because if those were the circumstances you would have the opportunity under every 27.26 to bring the prosecutor in under oath and ask him how he

prepared his case and what he revealed and why he took certain actions, and this Court is not going to indulge you in that.

MR. SINDEL: Well, Your Honor, I would like to indicate that I would persist in my questioning –

THE COURT: I'm sure you would but you're not going to.

MR. SINDEL: I'll confine myself to the Court's ruling.

THE COURT: We're going to stick with what I believe the law on the subject is as I have just read it. I'm not going to –

MR. SINDEL: We agree to disagree. I have no further questions of [Nels Moss].